for the transfer of this interest from the Prudence Bonds Corporation interest was an additional investment.

A further and seemingly embarrassing fact which respondents have ignored is that the *Geist* case involved not alone this uncertificated share of the mortgage, but $816.67 of certificates which had been guaranteed by Prudence and reacquired by it by purchase in 1932 (*Prudence Realization Corporation* v. *Geist, supra,* at p. 91). The decision in that case awarded parity to petitioner on the full interest in the mortgage held by it, both certificated and uncertificated. The distinction urged by respondents therefore is not available.

4. The argument made by respondents under Point III (b) of their brief seeks to justify the decision of the Circuit Court of Appeals as not conclusive since further proceedings are necessary, during which petitioner would have an opportunity to be heard.

The basic issue of parity or subordination, however, has been adjudicated. That may not be attacked. The sole question left open is how petitioner, *as a subordinated claimant,* may participate. The plan, which provides for parity, has been amended to provide for subordination and the consequent separate and subordinate classification of petitioner. No further proceedings dealing with *that* issue are open to petitioner. Only the manner of subordination will be the subject of future hearings, but no further proof may be adduced by petitioner for the purpose of securing a determination that its certificates are entitled to parity as a matter of equity.

5. Respondents' reference to petitioner as a mere transferor of the guarantor's rights, as a purchaser at a bankruptcy sale, has been treated at page 13 of the petition.

6. Respondents' persistence in treating the issue of status as one controlled by legal precedent rather than by existing equities, demonstrates the true conflict here. Respondents

insist that when a guarantor repurchases a claim against a primary obligor, the guarantor is conclusively subordinated to the rights of the holders of other similarly guaranteed claims in the primary obligor's insolvency proceeding. The solvency or insolvency of the guarantor at the time of repurchase, or at the time of the primary obligor's insolvency proceeding, is deemed by respondents to be immaterial.

The rule heretofore applied to subordinated solvent sureties is a rule of equity applied not upon the basis of equities as they existed at the time of fulfillment of the sureties' obligation, but upon the equities existent at the time of the insolvency proceeding for the primary obligor.

In the present case the equities similarly are to be ascertained as they now exist. The creditors' plan for Prudence is not referred to in order to show that by its provisions these respondents are cut off from any right to claim priority. It demonstrates, however, that petitioner was organized to liquidate Prudence's assets for the benefit of all of its creditors, including these respondents; that it defaulted on its guaranty obligations; and that all of its creditors have been similarly affected and that actually the Tigo certificate holders would receive a greater portion of the insolvent guarantor's estate than will these other creditors.

If Prudence had not purchased these certificates the original holders would have been entitled to parity in this proceeding. That portion of Prudence's assets which, in fact, were used to purchase them would now be part of the estate in petitioner's possession for distribution to all of Prudence's creditors in accordance with the Prudence plan. The granting of priority to the other Tigo certificate holders in the present proceeding, thus far decreed in the name of equity, gives to them the exclusive benefit of that portion of the Prudence estate represented by petitioner's Tigo certificates, and effects a preference in their favor as against the other guaranteed creditors. This is not equity at all but a determination that Prudence, then in-

solvent, by acquiring some of the Tigo certificates, used its assets to prefer the *remaining* Tigo certificate holders at the expense of its other guaranty holders.

The concluding argument of these respondents is that if Prudence, "with greater regard for its guaranty obligation and the fulfillment of its fiduciary obligation to certificate holders, had made pro rata payments instead of grossly discriminating as it did, it would be perfectly clear that no claim based on the partial pro rata payments, could be allowed here in competition with the other certificate holders" (Respondents' brief, pp. 25, 26).

That argument eloquently states the inequity of the result here and the necessity for review. If Prudence, instead of buying these certificates, had used its funds and assets to pay off all of its debts pro rata, then all of its creditors would have shared in its assets on an equal basis. Had that been done, there would be no basis for now urging preference on behalf of these Tigo certificate holders in the distribution of the proceeds of the remaining assets of Prudence now held by petitioner. If, as argued by respondents, Prudence made improper use of its assets at the time of repurchase, that was inequitable as against all creditors. Now, as respondents themselves state their case, a court of equity is being requested to remedy an original inequity toward all creditors by directing another in favor of these guaranty creditors as against the remaining Prudence creditors.

Since the concurring opinion in the *Ferris* case has been considered a precedent for such a result, a review in this case would seem appropriate.

II

As to the brief of the Securities and Exchange Commission

1. The Commission argues that the solvency of the guarantor is of procedural importance only to avoid circuity of action. However, subordination of the solvent sureties has been decreed where their suretyship obligations have been fulfilled (*U. S.* v. *National Surety Co.*, 254 U. S. 73; *Jenkins* v. *National Surety Co.*, 277 U. S. 258; *American Surety Co.* v. *Westinghouse Electric Manufacturing Co.*, 296 U. S. 133).

In the *Geist* case this Court dealt with the insolvency of Prudence, not as a matter of procedure, but as demonstrating the inequity of granting priority to one group of guaranty creditors at the expense of others (*Prudence Realization Corporation* v. *Geist, supra,* at p. 97).

Petitioner does not urge, as charged by the Commission, that insolvency *per se* requires that all equities be brushed aside. On the contrary, petitioner urges that the insolvency of the guarantor brings equities into play, and that in applying an equitable rule the court must examine all of the circumstances in order to determine on equitable grounds whether these certificate holders are entitled to priority here, and consequently to preference in the payment of their guaranty claims. The Commission also states that if Prudence had made pro rata payments instead of purchasing these certificates at discount there would be no controversy here. From that premise the Commission concludes that the failure to make such pro rata distributions requires a subordination determination here to remedy the damage caused by Prudence's improper action. However, as demonstrated above, this argument is self-defeating, for it ignores the fact that only upon a parity determination will the creditors of Prudence be placed in

the position which they would have occupied if Prudence initially had properly disposed of its funds for the payment of all of its outstanding obligations. No Tigo certificate holder suffered any damage at the time of the original purchase by Prudence which was not shared by all other guaranty creditors. Parity would return all creditors to the position which they would have occupied had the insolvent guarantor properly utilized its assets. It would seem reasonable to expect that equity should seek to accomplish such a result rather than to compound such original inequity and impropriety by judicial decree.

In view of the Commission's participation in this case and its recognition of the substantial nature of the question involved, it would appear that the question is of sufficient general importance to warrant review by this Court, so that a determinative decision on the proper application of equitable rules of distribution of insolvent estates may be rendered.

CONCLUSION

Wherefore, your petitioner prays that a writ of certiorari be granted to review the order and decision of the United States Circuit Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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